THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT FORT PORTAL

(Coram: Egonda-Ntende, Bamugemereire & Mugenyi, JJA)

CRIMINAL APPEAL NO. 243 OF 2021

(Arising from Criminal Session Case No. 23 of 2018)

1. **ALIBANKOHA JOSEPH**
2. **SSEBITOSI JOSEPH**
3. **SEKAYI ACKLEO**
4. **MUKISA FRED**
5. **SEMAKARU LEONARD ..... APPELLANTS**

VERSUS

UGANDA ..... RESPONDENT

(Appeal from the High Court of Uganda at Masindi (Byaruhanga Rugyema, J) in Criminal Case No. 23 of 2018)

JUDGMENT OF THE COURT

A. **Introduction**

1. This is a first appeal from the decision of the High Court in Masindi (Byaruhanga Rugyema, J) in which Messrs. Joseph Alibankoha, Joseph Ssebitosi, Fred Mukisa and Leonard Semakaru ('the Appellants') were on 10th July 2019 convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act, Cap. 120.

2. The prosecution case as accepted by the trial court is that on 14th September 2017 Gordon Twesiime ('the deceased') had boarded a taxi Reg. No. UBA 096H heading to Kampala. At Karuguuza town in Kibale district, the driver of the vehicle stepped out of it briefly whereupon the deceased moved to the passenger seat and commandeered the vehicle in the direction of Kakumiro District, later branching off to Mitujju trading centre. Pursuant to the report of the driver along with radio announcements on the missing vehicle, a mob staged a road block at Mituju, deflated the tyres of the vehicle and descended upon the deceased, beating him up and wounding him critically. Although the mob was later dispersed by the police, the deceased died shortly upon arrival at Mubende Referral Hospital where he had been rushed by the police.

3. The Appellants (and others that were subsequently acquitted by the trial court) were thereupon arrested, charged with the deceased's murder and, upon conviction, each sentenced to life imprisonment.

4. Dissatisfied with their conviction and sentence, the Appellants lodged this Appeal in this Court proffering the following grounds of appeal:

    I. *The trial Judge erred in law and fact when he did not properly evaluate the evidence on record and as a result reached a wrong conclusion that caused a miscarriage of justice.*

    II. *The trial Judge erred in law and fact when he passed an illegal, manifestly harsh and excessive sentence of life imprisonment against the Appellants, thereby occasioning a gross miscarriage of justice.*

5. Ground 1 of the Appeal was at the hearing of the appeal amended to read as follows:

The trial Judge erred in law and fact when he did not properly evaluate the evidence on record regarding the participation of the appellants and as a result reached a wrong conclusion that caused a miscarriage of justice.

6. Ms. Angela Bahenzire represented the Appellants at the hearing, while the Respondent was represented by Ms. Sherifah Nalwanga, a Chief State Attorney.

B. **Parties' Legal Arguments**

7. No submissions were forthcoming with regard to *Ground 2* of the Appeal, the legal arguments in this matter solely addressing *Ground 1*. The Appellants maintain the position taken before the trial court that they did not participate in the deceased's murder, arguing that the circumstances that prevailed at the scene of crime did not favour correct identification. It is argued that there was a huge crowd of people pelting stones at the deceased; PW1, a police officer, was too busy firing bullets to disperse the crowd to have identified anyone at the scene, and when he got overwhelmed by the crowd he left the scene. This is opined to have been a scene of complete chaos.

8. It is further argued that there was no evidence before the trial court of the direct participation of Joseph Ssebitosi, Ackleo Sekayi and Fred Mukisa ('the Second, Third and Fourth Appellants' respectively), and therefore they should have been released like their co-accused Julius Mugabi, Godfrey Semuga and Paul King were as they did not contribute to the harming of the deceased. Counsel for the Appellants contends that although Exhibit DEX1 (the Fourth Appellant's police statement) did place him at the scene of crime, having simply stated that he had found the deceased being beaten and witnessed the police trying to rescue him, that statement did not depict any participation by him in the mob's actions so as to justify the trial judge's recourse to the doctrine of common intention.

9. The trial judge is faulted for ignoring the inconsistencies and contradictions that riddled the prosecution case. For instance, the investigating officer relied on two crime preventers, Richard Wagaba (PW2) and Sam Kasibante (PW3), to identify the Appellants' homes yet the same witnesses had testified that they did not see the Appellants at the scene of crime. Furthermore, although the Fourth Appellant had clearly presented an alibi in his police statement that was adduced in evidence

as Exhibit PEX1, the trial judge nonetheless convicted him on the authority of **R vs Sekha & Others (1939) EACA 145** where it was observed that an alibi should be brought forth as early as possible to obviate doubts as to its genuineness. In any case, it is argued, there is no evidence that links the Appellants to any of the items – pangas, spears, stones or sticks – used by the mob to fatally assault the deceased.

10. Conversely, State Counsel contends that the trial judge did evaluate the evidence before him and came to the conclusion that the Appellants had been correctly identified at the scene of crime by PW1, PW2, PW3 and PW5, whose evidence proved their participation in the deceased's murder. It is argued that the trial judge correctly convicted the Appellants on the basis of the following evidence. PW1 had seen the Fifth Appellant approach the deceased with a panga and cut his arm, and identified the other Appellants at the scene of crime; PW2 corroborated the identities of the Appellants whom he knew well having seen them in markets, bars and in the trading centre; PW3 similarly identified the First, Second and Third Appellants at the scene of crime, as well as witnessed the Fifth Appellant spear the deceased in the stomach, and Chance Spider (PW5) – who was attacked together with the deceased – heard the Fourth Appellant loudly state that he was not ready to leave until he squeezed the life out of the deceased.

11. On the authority of **Abdala Nabulere & Another vs Uganda, Criminal Appeal No. 9 of 1978** the trial judge is further supported for his finding that the circumstances at the scene of crime favoured correct identification as the attack on the deceased had ensued in broad daylight; PW1 knew the Appellants well before the incident; the incident took considerable time, giving PW1 and PW5 ample time to identify the Appellants, despite PW1 having been later on pelted with stones.

12. State Counsel denies any inconsistencies in the prosecution evidence, supporting the finding of the trial court that upon PW1's arrival at the scene of crime he witnessed the Fifth Appellant cut the deceased's arm, which evidence was corroborated by the post-mortem report (PEX1). The post mortem report also supposedly corroborated the evidence of PW5 that he had seen the Fifth Appellant

spear the deceased's stomach. The trial judge is further supported for his finding that the Appellants' alibis were destroyed by the prosecution evidence that placed them at the scene of crime. The judge is additionally supported for the finding that the Appellants formed a common intention to apprehend a car thief and fatally attacked him.

13. Addressing *Ground 2* of the Appeal, it is argued that a sentence of life imprisonment cannot be considered illegal when the offence of murder carries a maximum penalty of death. In State Counsel's view, the trial judge's deference to a life imprisonment sentence is justified by the following aggravating factors: First, the mob was alerted by the owner of the vehicle that the deceased had a mental problem but the Appellants would not listen. Secondly, the Appellants purportedly hurled stones, bricks and sticks at the deceased even after the police sought to come to his rescue, resulting in a very painful death for him. The trial judge therefore considered such impunity to warrant a deterrent sentence, considered the 4-year period spent on remand and sentenced the Appellants to life imprisonment.

14. Urging non-interference with the sentence, reference is made to **Karisa Moses vs Uganda, Criminal Appeal No. 23 of 2016** (SC), **Kiwalabye Bernard vs Uganda, Criminal Appeal No. 143 of 2001** (SC), **Kobusheshe Karaveri vs Uganda, Criminal Appeal No. 110 of 2008** (COA) and **James s/o Yoram vs Rex (1950) 18 EACA 147** for the proposition that an appellate court ought not to interfere with a sentence imposed by a lower court unless the sentence is illegal or so manifestly excessive as to amount to a miscarriage of justice. Reference is further made to **Aharikunda vs Uganda (2018) UGSC 49** where it was held that the discretion at sentencing rests with the trial judge who has had the opportunity to observe the proceedings and assess the demeanour of the witnesses first-hand.

15. A sentence of life imprisonment for a murder that entails active participation in the hacking of a victim with a panga is opined to be justified to the extent that it was upheld in **Kaddu Kavulu Lawrence vs Uganda, Criminal Appeal No. 72 of 2018** (SC), **Magezi Gad vs Uganda, Criminal Appeal No. 17 of 2014** (SC), **Opendi & Another vs Uganda (2023) UGCA 58** and **Sebuliba Siraj vs Uganda, Criminal**

Appeal No. 319 of 2019 (COA). Life sentences were similarly upheld in **Kato Kajubi Godfrey vs Uganda, Criminal Appeal No. 20 of 2014** (SC), where the appellant was not an active participant in the murder but aided and procured the same; as well as in **Turyaheebwa Ezra & Others vs Uganda, Criminal Appeal No. 50 of 2015** (SC) for a murder that arose out of mob justice.

C. **Determination**

16. This being a first appeal, this Court is required to review the evidence and make its own inferences of law and fact. *See Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13 – 10.* It is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial Court and, while giving allowance for the fact that it has neither seen nor heard the witnesses, come to its own conclusion on that evidence. In so doing, the first appellate court must consider the evidence in its totality and not any piece thereof in isolation. It is only through such re-evaluation that it can reach its own conclusions, as distinct from merely endorsing the conclusions of the trial court. *See* ***Baguma Fred vs Uganda, Criminal Appeal No. 7 of 2004*** *and* ***Kifamunte Henry vs Uganda, Criminal Appeal No. 10 of 1997*** *(both, Supreme Court).*

17. The complaint in this case is that the Appellants were convicted on identification evidence that did not sufficiently establish their participation in the offence, was riddled with inconsistencies and the Appellants' alibis were completely ignored by the trial court. The trial judge reviewed and accepted the prosecution evidence before discharging himself as follows with regard to the alleged inconsistencies:

> *I have examined the pieces of evidence as regards the role played by A9, especially the evidence of PW1, PW3 and PW5. It is true, PW1 stated that he saw A9 cut the deceased's arm/hand and PW5 saw A9 with a spear, pierce the deceased in the stomach. However, the version of PW1 is supported and corroborated by the evidence of PW3 who while at the scene heard the people present, state that it is A9 who cut the arm of the deceased and thereafter went away with his panga. It is corroborated by the Post Mortem Report (P.Exh.1) which indicated one of the external injuries on the deceased to include a "gross laceration of the right elbow. It is during another moment that PW5 saw A9 spear the deceased on the stomach. A9's actions were not simultaneous. This was also again corroborated by P.Exh.I, a laceration on the abdomen. On my part, I do not see or appreciate any*

contradiction as regards the evidence of PW1 and PW5. The seeming contradiction was explained by PW5 when he stated thus;

> ***"A9 came with a spear and. speared Engineer on the stomach. I heard people trying to protect me that I was a passenger and I should be spared.. While A9 Speared the Engineer, the realistic people started blaming A9, 'oh Semakaru, why have you done that yet the announcement was to the effect that nobody should be killed.' This is when I identified A9 as Semakaru. Then thereafter, A9 picked a panga and came to cut me."***

During cross examination, PW5 explained further that;

> ***"He (Semakaru) would carry a spear, then reappear with a panga."***

It is clear from the above explanation by PW5 and considering the terror that the mob had reigned on the victims, A9 whom PW5 referred to had been the ring leader/ commander of the mob, variously carried, held a spear and a panga and used them at different moments to inflict the above named harm on the deceased. There is therefore no contradiction between PW1's evidence and that of PW5. They instead corroborated each other on A9's presence at the scene and the role he played.

18. The trial judge then considered the alibis raised by the appellants against the identification evidence on record and held:

> *A1 himself in his defence, placed himself at the scene of crime when later in his testimony, stated that at around 6.00am, he went to the scene and saw a vehicle that was allegedly stolen by the deceased which had been intercepted by the mob. That it had 2 people inside. Indeed, it was only the deceased and Spider (PW5) who were in the mini bus vehicle at the time of crime. It is not expected that every prosecution witness ought to have identified each of the accused persons. It was A1's further testimony, that however, he left the scene and returned at around 7.00am upon hearing gun shots dispersing the mob at the scene. Though he claimed to had stood at a distance whereupon he saw police lift a lifeless body of the deceased into the vehicle whom they took to Mubende, PW1 saw him at the scene in action armed with a stick and there is nothing to show that he disassociated himself from committing the offence. Instead, as clearly revealed by PW5, when the realistic people were urging the mob to leave the victims safe, A1 was heard loudly state that he was not leaving until he squeezed life out of the deceased. Indeed, Engineer Gordon Twesiime lost his precious life in the hands of the mob that included A1. PW3 had also found and identified A1 as among those who participated in the deadly mob assault of the deceased. The A1's alibi is therefore in the circumstances, disbelieved. It is a mere afterthought. Sebitosi Joseph (A3) also denied being at the scene. That on the fateful day, he was at his place which is about ¼ mile from the scene of the crime. That later at around 8.00am, he left his home and went to Kyababoga village to cultivate and returned at around 4.00pm. However, during the trial, PW1 explained how A3 joined the mob. It was not disputed that PW1 knew A3 very well. Nowhere on record, during cross-examination, A3's alibi*

was put to PW1 and PW3 who identified him at the scene. The alibi was put forward at a later stage during the defence. Court is entitled to regard such an alibi as a mere afterthought. I find that both PW1 and PW3 placed A3 at the scene of the crime. Both PW1 and PW3 found and identified him as one of those who participated in the deadly mob action that led to the death of the deceased. As regards Sekayi Ackleo (A5), he also denied being at the scene. That on the fateful Friday, he went to his work place in Kasuli village to burn his bricks. In his further testimony however, he revealed that during the morning hours of the fateful day, he was at a one Sewanyana's shop waiting for him to open so that he could by sugar and then proceed to his work place, that this is when he was able to see the scene of crime where he saw A9 and others. Considering the fact that PW1 stated that he saw A5 with stones, which evidence is supported by that of PW3 that he was among the mob who assaulted the deceased to death, and the fact that this albeit late alibi was never put to any of the identifying witnesses; PW1 and PW3, I am inclined to believe the prosecution evidence, that A5 was at the scene of the crime and disbelieve the alibi as a mere afterthought. .... Mukisa Fred (A7) also denied being at the scene of the crime at the alleged time of commission of the offence. That he had gone to work at Kasala village cultivating on a one Sempala's land. That he left on l0/9/17 and returned on 17/9/17. However, that when he was in the bar drinking, he heard people say that A9, Sebyole and Pascal were among the mob that killed the deceased. To prove his alibi, he asked court to look at his statement. A7's police statement was therefore in the circumstances received in evidence and marked (D.Exh.1). In A7's police statement (D.Exh.l) dated 2T/9/ 17, he revealed as follows;

> ***"That it was around 0530 hrs in the morning when I was sleeping at home in the trading centre of Mituju. I woke up and moved there. I found people like Semakaru Ronald, Pascali Mulindwa, Mwanje, Sebyole Hassan and others whom I did not identify because there were very many people. They were busy beating a man using bricks and sticks and they were saying that they were beating a thief, that had stolen a vehicle. The police came from Nyamara and they started shooting bullets to rescue the man but these people were so hostile and they killed the man. There was also another man whom they had tied on a tree and he was also beaten seriously."***

Surely, as seen from A7's statement, it does not support his alibi. Though in the statement he denied participating in the mob action of assaulting the deceased. It is proved beyond reasonable doubt that he was at the scene of the crime on the fateful day and was clearly identified by PW1. PW1 identified him in action lynching the deceased. As regards Semakaru Leonard (A9) it is his statement that from 12/9/17 to 18/9/17, he was at Mubende hospital where he was nursing his sick child. That it is when he returned, that the crime preventers arrested him on allegations of murder of the deceased. He was however not able to present medical documentation regarding his child's sickness and admission in Mubende Hospital. He claimed that the documents were removed from him by the crime

preventers. However, during the trial, nowhere did he put this alibi to either of the prosecution witnesses i.e PW1, who stated that he saw him cut the deceased's hand/arm, PW5 who saw him spear the deceased on the stomach or A5, A6, and A7 who in their defence place him at the scene of the crime. Secondly, during cross examination, the defence did not put to any of the crime preventers i.e PW2 and PW3 the claim regarding the removal of his medical documents regarding his child's admission in Mubende. As a result of the above, this court is inclined to believe the prosecution's identifying witnesses and reject A9's defence of alibi as being a mere afterthought.

19. The learned judge concluded:

> *As admitted by the defence, the offence was committed during broad day light. PW1 and PW5 went to the scene of the crime. PW1 in particular knew the accused personally well and had known them even before the incident. The incident took some considerable time to enable PW1 and PW5 identify the offenders. It is true there was chaos, stones were being pelted at the deceased and later at PW1, PW5 was tied on a tree, but all these factors, would not hinder a police officer from identifying people he knew who committed an offence. In the instant case, I am satisfied that there were correct conditions for proper identification of the offenders. The offence was committed during broad day light with some of the offenders like A1 boasting of impunity. I therefore in the premises, find that A1, A,3, A5, A7 and A9 were properly and correctly identified and have been sufficiently placed at the scene of the crime.*

20. The legal position on the defence of alibi was restated by the Supreme Court in **Festo Androa Asenua & Another vs Uganda (1998) UGSC 23** as follows:

> It is trite that by setting up an alibi, an accused person does not thereby assume the burden of proving its truth so as to raise a doubt in the prosecution case. See Ntale vs. Uganda (1968) E.A. 206. In the case of R. vs. Chemulon Were Olancro (1973) 4 E.A.C.A, it was stated:
>
> "The burden on the person setting up the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act." See also Ezekia vs Republic (1972) E.A. 42 at 48 on proof of alibi.

21. The defence of alibi neither negates the burden of proof upon the prosecution to prove its case to the required standard nor does it place a burden upon an accused person to so prove the truth of his/ her alibi. The only duty placed upon an accused person is '**to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act**.' Thus, in **Kutegana Stephen vs Uganda, Criminal Appeal No. 66 of 1996**, it was held:

It is settled law that the burden of proving an alibi does not lie on the prisoner beyond reasonable doubt. **Sekitoleko vs Uganda (1967) EA 531**. It is the duty of the Court to direct its mind properly to any alibi set up by an accused and it is only when the Court comes to the conclusion that the alibi is unsound that it would be entitled to reject it. See **R vs Thomas Finel (1916) 12 Cr. App. Rep. 77**.

22. In this case, the First Appellant's evidence clearly places him at the scene of crime. He attests to having initially found the stolen vehicle with two occupants in it at 6.00am, then returned to the scene at 7.00am in response to bullets being fired in the air but on that occasion he stood far away from the scene and observed people running away from it. His evidence supports PW1's testimony that the deceased had been apprehended by the mob before 6.30am when he received the phone call to go to the scene of crime. It does also support the testimony of PW5 that the mob's attack on the deceased and himself, particularly the spearing of the deceased in the stomach, ensued before PW1 arrived at the scene and fired bullets in the air. Meanwhile, the Fourth Appellant purports to present an alibi that he was away from Mutujju village where the mob attack took place between 10th – 17th September 2017, cultivating a piece of land in Kasala village and had stated as much to the police upon his arrest. However, a careful scrutiny of the police statement, which was admitted in evidence as Exhibit DEX1, reveals that the said appellant was in fact at the scene of crime and witnessed the attack on the deceased. In fact, the witness identifies the Fifth Appellant as one of the deceased's attackers in corroboration of the prosecution evidence.

23. We are satisfied, therefore, that the First and Fourth Appellants fall short on the duty upon them to so account for the time within which the offence took place as to place them away from the scene of crime. *See* ***Festo Androa Asenua & Another vs Uganda*** *(supra) and* ***Ezekia vs Republic*** *(supra).*

24. On the other hand, the Second Appellant did set up an alibi, testifying to have been at his home until 8.00am when he left for Kyababoga village to graze his cows, only returning home at 4.00pm. On his part, the Third Appellant attested to having observed the scene of crime from a nearby shop where he had gone to buy sugar before proceeding to his work place. He testified that he informed the police of his whereabouts but they declined to record his alibi. He, however, attested to having

seen the Fifth Appellant at the scene from his supposed vantage point at the shop. In the same vein, the Fifth Appellant denied being at the scene of crime and attested to having been at Mubende Hospital nursing his sick child between 12th – 18th September 2017 but his medical receipts had been impounded by the police upon his arrest.

25. It is observed that all the Appellants gave unsworn evidence and therefore the veracity of their testimonies were not tested in cross-examination. Nonetheless, that would not negate the duty upon the prosecution to place them at the scene of crime and establish their participation in the murder. Thus, the First and Fourth Appellants' questionable alibis, as well as the untested alibis of the Second, Third and Fifth Appellants notwithstanding; the prosecution bears the duty to place each of the Appellants at the scene of crime and establish their participation in the offence. It is therefore to the identification evidence that we turn, which evidence shall be re-evaluated alongside any inconsistencies as alleged or at all.

26. PW5 was a victim of the mob attack together with the deceased. It was his evidence that when he and the deceased were stopped by the mob at Mitujju, he came out of the car, was tied to a tree and pelted with stones, but some of the people in the mob decided to protect him until PW1 arrived, shot in the air and he was able to be taken away from the scene of crime. The deceased on the other hand locked himself in the car and raised the windows upon being stopped by the mob and (without explaining how the spear went through the locked car) PW5 observed someone that the crowd referred to as Semakaru (the Fifth Appellant) spear him in the stomach. The only other appellant that he identified at the scene of crime was the First Appellant, whom he heard state that he was no prepared to leave the scene of crime before squeezing the life out of the deceased and himself. This witness places the First and Fifth Appellants at the scene of crime thus demolishing their alibis. His evidence is corroborated by PW1 and PW2 who place all the Appellants at the scene of crime, and additionally testify as follows with regard to their participation in the murder.

27. PW1 attests to having arrived at the scene of crime with PW2 following an alert that he arrests a car thief from Mutujju (where he had been apprehended by a mob)

and return him to the police station. He found PW5 tied to a tree while the deceased was seated on the ground next to the '*stolen*' vehicle being pelted with stones by a rowdy crowd of about 200 people. After firing in the air, the witness was able to whisk PW5 (a police officer) to safety and thereafter focus on the deceased, whom he observed to have a broken leg but makes no mention of any bleeding from the supposed spear wound attested to by PW5. He attests to having run out of bullets before police reinforcement came whereupon the crowd reassembled and resumed the pelting of stones and sticks upon the deceased. It is at that point that he observed the Fifth Appellant cut the deceased's arm with a panga; while the First Appellant armed with a stick, and the Third and Fourth Appellants with stones, descended upon the deceased and assaulted him, while the Second Appellant was among those hurling stones at him. The witness testified that he knew all the Appellants before the fateful incident.

28. PW1's evidence is materially corroborated by PW2, save that the latter witness was only able to identify the Appellants by face as people he often met around the trading centre. In addition, PW2 attests to having found the deceased bleeding from head injuries, a wound to his shoulder and a stabbed stomach. It seems to us that such bleeding ought to have been obvious to any witness that observed the deceased, such as PW1 claims to have done, and would therefore discount the part of that witness' testimony that suggests that amid firing in the air, he was able to observe the deceased. We are more inclined to believe his testimony that upon running out of bullets he '*withdrew to about 10 metres*' away from where the deceased was.

29. In any case, PW5's evidence in respect of the cut on the deceased arm is corroborated by PW3 who arrived at the scene during the firing in the air, while PW4 corroborates PW2's evidence with the observation that when he arrived at the scene as part of the police reinforcement, the deceased '*had blood all over ... with several injuries on the body, had cut wounds and blunt injuries*.' The external injuries sustained by the deceased are further explained by the post mortem report as '*gross scalp laceration with (right) elbow laceration plus abdominal wall laceration*.' Furthermore, PW1's failure to closely observe the deceased while trying to disperse a rowdy crowd would not negate his identification of the

Appellants at the scene of crime and among those that attacked the deceased when he run out of bullets. The Appellants' identification is corroborated by PW3 who, after removing the motor vehicle from the scene of crime, returned there to find the First, Second, Third and Fifth Appellants still present at the scene of crime with the rest of the mob. We therefore find that the inconsistencies in the prosecution evidence are minor and, at any rate, explained by the totality of evidence on record. *See* ***Alfred Tajar vs Uganda vs Uganda (1969) EACA Criminal Appeal No 167 of 1969***.

30. The test of correct identification in a criminal trial was laid out in the *locus classicus* of **Abdala Nabulere & Another vs Uganda, Criminal Appeal No. 9 of 1978** as follows:

> The court must closely examine the circumstances in which the identification was made. These include the length of time the accused was under observation, the distance between the witness and the accused, the lighting and the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good then the danger of mistaken identity is reduced. The poorer the quality, the greater the danger.

31. In this case, given that PW1, PW2, PW3 and PW4 – the police officers and crime preventers that tried to save the deceased – were similarly under attack from the large rowdy crowd, those circumstances would have enabled them to only single out the major perpetrators of the mob attack. PW1 attested to having known them before the incident, while PW2 who was with him and the attack victims as they tried to rescue the latter from the mob, attested to having identified the major attackers by face in the persons of the Appellants. Whereas PW1 might have been engaged in the firing in the air, clearly PW2 had sufficient time to observe their attackers at close range. His evidence is specifically corroborated with regard to the Fifth Appellant by PW5, the second victim to the attack, who witnessed the said appellant spear the deceased. Non-clarification as to the point at which the deceased was removed from the car where he had reportedly locked himself would be explained by the tension of the moment to a witness that was under attack as well. Furthermore, there is nothing on record to suggest that the daylight at 6.00 –

7.00 am on the fateful day would have been insufficient to support the correct identification of the Appellants at the scene of crime.

32. The Appellants having been placed at the scene of crime actively participating in the attack on the deceased, we cannot fault the trial judge's finding on the applicability of the doctrine of common intention that is set out in section 20 of the Penal Code Act as follows:

> **When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.**

33. Consequently, we find that the Appellants were properly convicted for the deceased's murder.

34. We now turn to *Ground 2* of the Appeal. It is well recognised that an appropriate sentence is a matter for the discretion of the sentencing judge, which discretion is premised on the intrinsic circumstances of each case. It is also fairly well established judicial practice that an appellate court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or the appellate court is satisfied that the sentence imposed by the trial judge was so manifestly excessive as to perpetuate an injustice. *See* ***Karisa Moses vs Uganda, Criminal Appeal No. 23 of 2016***, ***Kiwalabye Bernard vs Uganda, Criminal Appeal No. 143 of 2001*** *and* ***Kyalimpa Edward vs Uganda, Criminal Appeal No 10 of 1995*** *(all, Supreme Court).*

35. In the matter before us, the trial court discharged itself at sentencing as follows:

> *The accused persons are first offenders who have been convicted of the offence of murder that carries a maximum sentence of death. The deceased had had a mental problem which led him to without authorisation drive off somebody's vehicle and when he was intercepted by a mob, it assaulted him to death. The mob which was comprised of the accused persons were nevertheless alerted by the owner of the vehicle, a local Subcounty chief, Kisembo Bernard and others that the deceased should be left free for he had a mental problem. The accused persons refused to listen. They hurled stones, bricks and sticks at the deceased until when the police came for his rescue from the scene. In the presence of police, the assault continued, he was speared on the stomach and had*

his arm cut. He died a very scaring and painful death. One wonders where the accused persons secured and or generated such anger for doing away with deceased's precious life in such a manner. The fact that the accused persons acted with impunity and took away the life of the deceased who was a District Engineer, they deserve a tough deterrent sentence. In view of the fact that they have been on remand for a period of about 4 years and the other circumstances of this case, I don't consider the maximum sentence but consider life imprisonment as the appropriate sentence for each of the accused persons. Each of the accused persons is therefore sentenced to life imprisonment for the murder of Eng. Twesiime Gordon.

36. We do not find the sentence imposed in this case to be illegal given that it falls within the threshold of applicable sentences for the offence of murder. In addition, the trial judge did take into account the period spent on remand in arriving at his sentence as is the constitutional imperative upon sentencing courts under Article 23(8) of the Constitution, albeit rounding it off to four years rather than the actual period of 3 years and 10 months.

37. However, the trial judge did not pay particular attention to the question of consistency in sentencing as proposed under clause 6(c) of the *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* ('the Sentencing Guidelines'), which enjoins a sentencing court to '**take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances**.'

38. In **Kamya Abdullah & Others vs Uganda, Criminal Appeal No. 24 of 2015**, the Supreme Court reduced a 30-year term sentence for murder to 18 years' imprisonment for each Appellant in an appeal that related to mob justice. It was held:

> Without downplaying the seriousness of offences committed by a mob by way of enforcing their misguided form of justice, a wrong practice in our communities which admittedly must be discouraged, we cannot ignore the fact that, in terms of sheer criminality, **such people cannot and should not be put on the same plane in sentencing as those who plan their crimes and execute them in cold blood**. The crowd which assembled at the scene of crime, according to the evidence, consisted of about 50 people. Most of these people participated in beating the deceased to death.

Police managed to arrest only a few who included the Appellants as identified by the prosecution witness.' (Our Emphasis)

39. Relatedly, in **Mudwa vs Uganda, Criminal Appeal No. 363 of 2017,** this Court held that it was injudicious to sentence the Appellant as though the offence he had been convicted of had not been committed in circumstances of mob justice involving other offenders. The Court reduced his sentence from 30 years to 20 years, exclusive of the remand period. Furthermore, in **Tumwesigye Rauben vs Uganda, Criminal Appeal No 181 of 2013**, this Court similarly reduced a 30-year custodial sentence to 20 years exclusive of the remand period in respect of an Appellant that had together with others beaten the deceased to death. Further reference is made to **Adiga vs Uganda (2021) UGCA 2** where this Court substituted a life sentence for with a sentence of 19 years and 3 months imprisonment; as well as **John Kasimbazi & Others vs Uganda, Criminal Appeal No. 167 of 2013** where a sentence of life imprisonment for murder was on appeal substituted with a 12-year term sentence.

40. We are alive to the observation made in **Wamutabaniwe Jamiru vs Uganda, Criminal Appeal No. 74 of 2007** (SC) where it was held that an appellate court is not to interfere with the sentence imposed by a trial court in exercise of its discretion unless such discretion '**results in the sentence being imposed to be manifestly excessive or so low as to amount to a miscarriage of justice**.' Considering the sentencing ranges in respect of murder by mob justice as highlighted above, we do find the sentence of life imprisonment handed down by the trial court in this case to be so manifestly excessive as to occasion a miscarriage of justice. We do therefore set aside the sentence imposed on the Appellants and, pursuant to section 11 of the Judicature At, Cap. 13, undertake there re-sentencing taking into account the actual period spent on remand. *See* ***Kamya Johnson Wavamuno vs Uganda, Criminal Appeal No. 16 of 2000***, ***Kiwalabye vs Uganda*** *(supra) and* ***Rwabugande Moses vs Uganda, Criminal Appeal No. 25 of 2014***.

41. It is recognised that the Appellants were first offenders that were part of a larger group of attackers and perhaps got carried away by the dynamics of mob justice where offenders' sense of judgment tends to get compromised in the flow of the

moment. However, they did have the opportunity to reconsider their actions given the pleas of various community leaders (including the victim of the alleged car theft) at the scene of crime. The need to purge communities of the vice of mob justice is thus acknowledged.

42. Due cognisance is additionally taken of the Appellants' respective ages as at sentencing on 5th August 2021 as follows: First Appellant (61), Second Appellant (29), Third Appellant (31), Fourth Appellant (38) and Fifth Appellant (39). The sentencing principle of parsimony posits that '**the sentence must be no more severe than is necessary to meet the purpose of sentencing**.'[1] Stated differently, parsimony proposes that punishment should be no greater than is necessary. This is in tandem with the caution in clause 9(3) and (4)(a) of the Sentencing Guidelines against custodial sentences for persons of advanced age. We reproduce the cited provisions below.

> (1) .....
>
> (2) .....
>
> **(3) The court shall before imposing a custodial sentence consider—**
>
> **(a) Whether the purpose of sentencing cannot be achieved by a sentence other than imprisonment;**
>
> **(b) the values, norms and aspirations of the people within the community;**
>
> **(c) the character and antecedents of the offender;**
>
> **(d) the circumstances and nature of the crime committed;**
>
> **(e) the ruthlessness with which the offender committed the offence;**
>
> **(f) the health and mental state of the offender;**
>
> **(g) previous conviction record;**
>
> **(h) the age of the offender;**
>
> **(i) remorsefulness or conduct of the offender;**
>
> **(j) whether the offender may be a danger to the community;**
>
> **(k) views of the victim's family or community; or**
>
> **(l) any other matter that court considers relevant.**
>
> **(4) The court may not sentence an offender to a custodial sentence where the offender—**
>
> **(a) is of advanced age;**

[1] See Report of the Australian Sentencing Advisory Council at https://www.sentencingcouncil.voc.gov.au/about-sentencing/sentencing-principles-purposes-factors

(b) has a grave terminal illness certified by a medical practitioner;

(c) was below 18 years at the time of the commission of the offence; or

(d) **is an expectant woman.** *(Our emphasis)*

43. Whereas at 61 years old, the First Appellant might not quite be of advanced age, we do consider his age be to be a mitigating factor against a lengthy custodial sentence. As younger people, however, the rest of the appellants ought to have been more responsive to the community leaders' prompting that urged them not to harm the deceased. Their failure to do so would call for a sentence that serves as a deterrent to other young people.

44. We are also duly mindful of the specific role played by the Fifth Appellant in cutting and spearing the deceased. The impunity with which he cut and stabbed the deceased, despite pleas to the contrary, is particularly troublesome.

45. In view all the foregoing circumstances, a 12-year custodial sentence is considered to be more appropriate for the First Appellant; 16-year sentences each for the Second, Third and Fourth Appellants, and a 20-year sentence for the Fifth Appellant. The three years and ten months spent on remand are deducted from each of those sentences to yield a custodial term sentence of 8 years and 2 months for the First Appellant; 12 years and 2 months for the Second, Third and Fourth Appellants, and 16 years and 2 months for the Fifth Appellant.

D. **Disposition**

46. In the result, this Appeal partially succeeds in the following terms:

I. The Appellants' conviction for the offence of murder is upheld.

II. The sentence of life imprisonment imposed on the Appellants by the trial court is hereby substituted with a sentence of 8 years and 2 months for the First Appellant; 12 years and 2 months for the Second, Third and Fourth Appellants, and 16 years and 2 months for the Fifth Appellant to run from the date of conviction.

It is so ordered.

Dated and delivered at Kampala this ..21st.. day of ..February.., 2024.

Fredrick M. S. Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Monica K. Mugenyi
Justice of Appeal